

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

B-213515

DATE: June 27, 1984**MATTER OF:**

Rainbow Roofing, Inc.

DIGEST:

1. Where Army failed to delete late bid provision in paragraph 8 of standard form 22 and substitute section 7-2002.2 of the Defense Acquisition Regulation, inadvertent error may not be cured under the "Christian Doctrine" since the Christian Doctrine does not permit the incorporation of mandatory provisions into an IFB when they have been inadvertently omitted.
2. A postage meter machine impression, whether imprinted by a postal employee, at a self-service post office, or by a private party, is not an acceptable "postmark" to establish the date of mailing of a late bid.
3. Where IFB requires a "postmark" on both envelope and on original certified mail receipt and where hand-cancellation bull's eye postmark was only on receipt while envelope had United States Postal Service meter machine impression, agency consideration of bid was improper since acceptable postmark must be present on both the bid envelope and receipt in order to establish the date of mailing of a late bid.

Rainbow Roofing, Inc. (Rainbow), protests the award of a contract to AAA Roofing Co. (AAA), under invitation for bids (IFB) No. DACA67-83-B-0072 issued by the Department of the Army (Army) for roof and gutter work at Fort Lewis, Washington.

We sustain the protest.

Bids were opened at 1 p.m., September 21, 1983, and, at that time, the apparent low bidder was Rainbow. Shortly after bid opening, AAA telephoned the Army and requested the bid results. After being informed that the Army had not yet received its bid, AAA advised the Army that its bid had been mailed on September 16, 1983, by certified mail.

AAA's bid package arrived on September 23, 1983. The envelope bore a United States Postal Service metered machine impression date of September 16, 1983, but did not have a hand-cancellation bull's eye postmark. Subsequently, AAA submitted the original certified mail receipt, which had a hand-cancellation bull's eye postmark dated September 16, 1983.

The Army states that paragraph 8 of standard form (SF) 22 was part of the IFB. The paragraph provides, in part, as follows:

"(c) The only acceptable evidence to establish:

"(1) The date of mailing of a late bid, modification, or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the bid, modification, or withdrawal shall be deemed to have been mailed late. (The term 'postmark' means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a hand cancellation bull's-eye 'postmark' on both the receipt and the envelope or wrapper.)"

The Army indicates that normally this paragraph is deleted and section 7-2002.2 of the Defense Acquisition Regulation (DAR) (1976 ed.) is substituted. Unlike paragraph 8 of SF 22, which requires a postmark on both the envelope or wrapper and on the original receipt, section 7-2002.2(c)(1) appears to accept as sufficient evidence of mailing the postmark on the wrapper or on the original receipt. The Army argues that its inadvertent error in not deleting paragraph 8 of SF 22 is cured under the so-called "Christian Doctrine" and that DAR § 7-2002.2(c)(1) permits the consideration of AAA's bid. See G.L. Christian and Associates v. United States, 312 F.2d 418, 160 Ct. Cl. 1 (1963). Alternatively, the Army argues that AAA's bid

satisfied the evidentiary requirements under the late bid provision set forth in the IFB. Rainbow argues that the late bid provision specified in the IFB controls and that provision requires a hand-cancellation bull's eye on both the envelope and the receipt in order to establish satisfactory evidence of mailing.

Initially, we note that the Army argues that Rainbow's protest to this Office is untimely since it was filed more than 10 working days after Rainbow had actual knowledge of the award to AAA. Under our Bid Protest Procedures, however, protests must be filed with either the contracting agency or this Office not later than 10 working days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1983). Here, Rainbow timely protested the September 30 award to AAA by letter dated October 5. Rainbow's subsequent protest to this Office, filed before the Army resolved Rainbow's initial protest, did not have to satisfy the same 10-day requirement and, therefore, will be considered on the merits. Chemex Alaska, B-212227, November 18, 1983, 83-2 CPD 586.

The Army acknowledges that our decisions have limited the Christian Doctrine to the incorporation of mandatory contract provisions into otherwise properly awarded government contracts. The Christian Doctrine has never been extended to include the incorporation of mandatory provisions into an IFB when they have been inadvertently omitted. 47 Comp. Gen. 682, 685 (1968); Mosler Systems Division, American Standard Company, B-204316, March 23, 1982, 82-1 CPD 273. However, the Army recommends that we reevaluate our position based on the Court of Claims decision in Condec Corporation v. United States, 569 F.2d 753, 177 Ct. Cl. 958 (1966). In Condec, the Court of Claims incorporated into the solicitation an Armed Services Procurement Regulation (ASPR) provision permitting the telegraphic modification of a bid where that provision had been omitted from the IFB. The Army contends that the present factual situation is similar and that the evidentiary requirements of the DAR provision should likewise be incorporated into this solicitation.

We disagree. The Condec decision merely stands for the proposition that it is legally permissible for a bidder who has submitted an otherwise successful bid to reduce that bid after bid opening. Park Construction Company, B-190191, July 18, 1978, 78-2 CPD 42; Mitchell Brothers General Contractors, B-192428, August 31, 1978, 78-2 CPD 163. Condec had already submitted the low responsive bid and the issue was whether the government could take advantage of a telegraphic modification lowering that bid. The consideration of the omitted ASPR provision did not conflict with any of the stated provisions in the solicitation nor did it affect the propriety of considering Condec's bid.

Here, the Army is attempting to vary a stated term of the solicitation after bids have been opened. Bidders were specifically notified that late bids would be considered in accordance with paragraph 8 of SF 22 and we have held that the late receipt of a bid will result in a bid's rejection unless the specific conditions of the IFB for the consideration of late bids are met. Intermed, Inc., B-213265, October 31, 1983, 83-2 CPD 522. Although the DAR provision was inadvertently omitted from the IFB, we cannot permit the Army to consider bids for award on a basis other than that specified in the IFB. See Geronimo Service Co., B-209613, February 7, 1983, 83-1 CPD 130; Emerald Maintenance, Inc.; The Big Picture Company, B-209082, B-209219, March 1, 1983, 83-1 CPD 208. Accordingly, we find that the late bid provision specified in the IFB should be applied in determining whether AAA's bid may properly be considered.

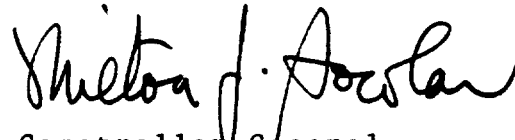
The Army contends that under the late bid provision specified in the IFB, AAA's bid was properly considered. Although recognizing that in 60 Comp. Gen. 79 (1980), we held that a hand-cancellation bull's eye was required on both the envelope and the receipt under this provision, the Army argues that because AAA's bid envelope bore a United States Postal meter machine impression rather than a privately controlled postage meter machine impression, the evidentiary requirements of paragraph 8 of SF 22 are satisfied.

In 60 Comp. Gen. 79, supra, we found that because the United States Postal Service could not substantiate that a certified bid envelope was actually deposited in the mail on the date shown on the receipt, a bidder must obtain a

hand-cancellation bull's eye on the envelope as well. Although in that case we were confronted by a postage meter machine impression made by a privately controlled meter machine, Federal Procurement Regulations (FPR) amendment 193, July 6, 1978, clearly states that the applicable FPR provision was modified to:

"remove . . . a postage meter machine [postmark] (whether operated by a postal employee, at a self-service post office, or by a private party) from recognition as an acceptable indication of the time of mailing."

Consequently, even where the envelope bears a United States Postal meter machine impression, a hand-cancellation bull's eye is still required on both the envelope and the receipt. Since AAA's bid envelope did not have a hand-cancellation bull's eye evidencing the date of mailing, the bid was improperly considered. Accordingly, Rainbow's protest is sustained and we recommend that the Army consider the feasibility of terminating AAA's contract for the convenience of the government.



Acting Comptroller General
of the United States